

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

NO. CR. 89-062 WBS GGH

Plaintiff,

ORDER DENYING A CERTIFICATE OF
APPEALABILITY

v.

MICHAEL L. MONTALVO,

Defendant.

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The Ninth Circuit has now had seven occasions to review the validity of defendant Michael L. Montalvo's sentence, see United States v. Montalvo, 581 F.3d 1147, 1148 (9th Cir. 2009), and this court has considered four times the denial of Montalvo's Federal Rule of Civil Procedure 60(b) motion. Upon the Order of Appellate Commissioner Peter L. Shaw, this case was remanded for the limited purpose of granting or denying a certificate of appealability ("COA").

Montalvo's first motion sought relief from the final judgment of his habeas proceeding pursuant to Rule 60(b), and his

1 four subsequent motions sought reconsideration of the court's
2 denial of that motion. Pursuant to Lynch v. Blodgett, 999 F.2d
3 401, 403 (9th Cir. 1993), a COA is required in order to appeal
4 from the denial of a Rule 60(b) motion that sought relief from
5 the judgment of a previous habeas proceeding.

6 Under Slack v. McDaniel, 529 U.S. 473 (2000), a COA
7 should issue "when the prisoner shows, at least, that [(1)]
8 jurists of reason would find it debatable whether the [motion]
9 state[d] a valid claim of the denial of a constitutional right
10 and that [(2)] jurists of reason would find it debatable whether
11 the district court was correct in its procedural ruling." Id. at
12 484.

13 In the original Order denying the Rule 60(b) motion,
14 the court held that it lacked the authority to rule that the
15 Ninth Circuit in United States v. Montalvo, 331 F.3d 1052 (9th
16 Cir. 2003) (per curiam), did not have jurisdiction to consider
17 whether the failure to instruct the jury in accordance with
18 United States v. Richardson, 526 U.S. 813 (1999), was harmless
19 error. See United States v. Montalvo, Nos. CIV. 97-2015, CR.
20 89-062, 2008 WL 4937624, at *1 (E.D. Cal. Nov. 17, 2008) (Docket
21 No. 1057). In the court's third order denying reconsideration,
22 the court held that, "although the Ninth Circuit's recent
23 decision in Phelps v. Alameida, 569 F.3d 1120 (9th Cir. 2009),
24 has led the court to question part of the analysis in its
25 November 17, 2008 Order, the court will nonetheless deny
26 defendant's motion for reconsideration because Greenlaw v. United
27 States, 128 S. Ct. 2559 (2008), does not present an intervening
28 change in the law governing defendant's case." United States v.

1 Montalvo, No. CR. 89-62, 2009 WL 2591356, at *4 (E.D. Cal. Aug.
2 21, 2009) (Docket No. 1072); see Phelps, 569 F.3d at 1133
3 (holding that subsequent changes in governing law could provide
4 relief pursuant to Rule 60(b)(6) based on a "case by case
5 inquiry"); Greenlaw, 128 S. Ct. at 2564 ("Under that unwritten
6 but longstanding rule, an appellate court may not alter a
7 judgment to benefit a nonappealing party. . . . [I]t takes a
8 cross-appeal to justify a remedy in favor of an appellee.").

9 In the fourth order denying reconsideration, the court
10 rejected Montalvo's argument that the court had committed clear
11 error in its third order denying reconsideration in applying
12 Greenlaw. See United States v. Montalvo, No. Cr. 89-62, 2009 WL
13 3157540, at *1 (E.D. Cal. Sept. 25, 2009) (Docket No. 1076). The
14 court also rejected Montalvo's challenge to the court's analysis
15 of Richardson because Montalvo did not point to intervening
16 authority following the Ninth Circuit deciding that failure to
17 give a Richardson instruction was harmless error and that
18 defendant's challenge to his conviction failed on the merits.
19 Id. at *2 (citing Montalvo, 331 F.3d 1052; Montalvo, 581 F.3d
20 1147).

21 The court has reviewed Montalvo's motions and concludes
22 that "jurists of reason" would not "find it debatable" that this
23 court lacked the authority to rule that the Ninth Circuit did not
24 have jurisdiction or that Montalvo was not entitled to relief
25 pursuant to Rule 60(b)(6).

26 Accordingly, the court will not grant the COA. The
27 Clerk of this court is directed to send a copy of this Order to
28 the Clerk of the United States Court of Appeals for the Ninth

Circuit.

IT IS SO ORDERED.

DATED: June 6, 2011

A handwritten signature in blue ink, reading "William B. Shubb", is written over a horizontal line.

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE